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Supreme Court, U.S.
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CLERK

No. USSC No. 85-654

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

SEYMOUR ALLAN HURVITZ, M.D.

REPRINTED COPY

Petitioner,

v.

DIVISION OF MEDICAL QUALITY, BOARD OF MEDICAL QUALITY ASSURANCE, DEPARTMENT OF CONSUMER AFFAIRS, STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FIVE

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether California Business and Professions Code (Bus. & Prof. Code) sections 2361(b) and (c),[1] as applied to particular facts of this case, are unconstitutionally vague and incapable of uniform enforcement, violating petitioner's Constitutional right of due process and equal protection of the

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1. Petitioner was charged in 1978 with violating Bus. and Prof. Code section 2361, subdivisions (b) (gross negligence) and (c) (incompetence). Before the completion of the administrative hearing, by Cal. Stats. 1980, chap. 1313, p. 4473, section 2, the Legislature amended, repealed and reenacted the provisions of the Medical Practice Act, Business & Professions Code sections 2000 et seq. The provisions of section 2361, subdivision (b) and (c) became section 2234, subdivisions (b) and (d), respectively, effective January 1, 1981. For consistency, respondent refers hereinafter to the relevant statute as section 2361.

law, and representing an impermissible delegation of legislative authority?[2/]

PARTIES

Petitioner is a physician who was issued a certificate under the jurisdiction of the California State Board of Medical Quality Assurance (Board), by the Board's Division of Licensing. A coordinate division, the Division of Medical Quality of the Board, has the responsibility for carrying out disciplinary actions appropriate to findings made by an

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2. Petitioner raised this issue for the first time in the California Court of Appeal, i.e., nowhere in his petition to the Superior Court did he raised the issue of the constitutionality of Bus. and Prof. Code section 2361. (Joint Appendix, Vol. 1, pp. 77-82.) The Board argued he was precluded from raising it for the first time on appeal. (Petn., pp. A15-A16.) Nevertheless, the Court of Appeal discussed the issue; accordingly, respondent addresses the point.

administrative law judge, and for suspending, revoking, or otherwise limiting certificates after the conclusion of disciplinary actions. Administratively, the Board is situated within the Department of Consumer Affairs of the State of California. For purposes of this proceeding, the respondent is deemed to be the Division of Medical Quality.

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Petitioner,

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DIVISION OF MEDICAL QUALITY, BOARD OF MEDICAL QUALITY ASSURANCE, DEPARTMENT OF CONSUMER AFFAIRS, STATE OF CALIFORNIA,

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FIVE

BRIEF OF RESPONDENT IN OPPOSITION

OPINION BELOW

The Court of Appeal of the State of California, Second Appellate District, Division Five, received petitioner's direct appeal from the Superior Court's judgment denying a writ of mandamus against the Board. In an unpublished opinion, the

Court of Appeal affirmed the judgment of the Superior Court, a judgment which provided that after considering the reporter's transcript of the administrative hearing (25 volumes of testimony, 11 volume of exhibits, and X-rays of 21 patients), the Superior Court concluded that petitioner had been afforded a fair trial and that the Board's decision was supported by the weight of the evidence.

As to the issue of a fair trial, the Court of Appeal confirmed that the trial court (Superior Court) was able to render an independent judgment based on the record before it and that there was no want of jurisdiction which would justify raising the issue of radiographic designations for the first time on appeal.

The Court of Appeal observed that even though expert testimony differed as to

the advisability of petitioner's surgery involving each of the 22 patients, there was no abuse of discretion by the trial court, whose findings are sustained on appeal if supported by substantial evidence on the whole record.

Furthermore, the Court of Appeal found no support for petitioner's argument that Bus. and Prof. Code section 2361 is unconstitutionally vague or an impermissible delegation of legislative authority to the Board.

Petitioner's subsequent petition for hearing in the California Supreme Court was denied by that body. (Petn., p. A3.)

JURISDICTION

This Court has jurisdiction to consider only the one question presented,

pursuant to 28 United States Code section 1257, subdivision (3).[3/]

Nowhere has petitioner complied with Supreme Court rule 21.1(h) which

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3. Although petitioner sets forth six questions for review by this Court (Petn., pp. i-iv), only question 2, set forth, supra, as the "Question Presented," qualifies for review by the Supreme Court pursuant to the jurisdictional authority cited. Only section 2361 was drawn in question in the California Court of Appeal on the ground of its being repugnant to the Constitution. The remainder of petitioner's questions, and the balance of his thirteen reasons for granting the writ (Petn., pp. iv-ix, 25-64, except for the relevant discussion at pp. 29-43), describe (a) issues not properly raised in the Court of Appeal (e.g., questions 1 and 3, pp. A15 & A16); (b) issues raised for the first time in the present petition (questions 4 & 5); or (c) a transparent attempt to involve this Court in a process of reweighing the evidence, including the credibility of witnesses. For these reasons, only a single question remains, i.e., the constitutionality of Bus. and Prof. Code section 2361, subdivisions (b) and (c). The propriety of raising even that issue is not without doubt; see, fn. 2, ante.

contains the requirement he specify the stage at which the federal questions sought to be reviewed were raised, the method or manner of raising them, and the reference to the places in the record which would show that the federal questions were timely and properly raised "so as to give this Court jurisdiction to review the judgment on writ of certiorari."

STATUTE INVOLVED

The California statute involved concerns two subdivisions of Bus. and Prof. Code section 2361. This statute provides, in relevant part:

> "2361. The Division of Medical Quality shall take action against any holder of a certificate, who is guilty of unprofessional conduct which has been brought to its attention, or

whose certificate has been procured by fraud or misrepresentation or issued by mistake.

"Unprofessional conduct includes, but is not limited to, the following:

". . . . .

"(b) Gross negligence.

"(c) Incompetence.

". . . . ."

STATEMENT OF THE CASE

The executive director of the Board filed an accusation against petitioner, charging that, as to each of 22 individual patients, petitioner had performed one or more unnecessary surgical procedures.

In findings of fact and determinations of issues (conclusions of law) which were

oted by the Board, the administrative judge concluded that petitioner should disciplined for gross negligence and ompetence, in violation of Bus. and . Code section 2361, subds. (b) (c).

After initially denying a writ of date to petitioner, the Superior Court ated its order, remanding the matter to Board for application by the fact der of a more stringent standard of of, following a recent appellate opinion Ettinger v. Board of Medical Quality urance (1982) 135 Cal.App.3d 853, 856. inger requires an administrative fact der to abandon the "preponderance of dence" standard, and to apply the ndard of "clear and convincing proof to easonable certainty".

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Applying the new standard of
the Board again found that
oner had committed acts and omissions
tuting gross negligence and
etence. (Petn., pp. A29-A95.)
ore, on judicial review by the
or Court, the findings were found to
orted by the weight of the evidence
decision of the Board was
ted by the findings. (Petn., pp. A4-

On appeal, petitioner articulated
ument against the constitutionality
and Prof. Code section 2361. The
of the unpublished opinion which
ed that challenge is set forth in
endix to the Petition, at pages A22
and including A27. The Court of
on May 13, 1985, affirmed the
t of the Superior Court and denied
oner's Constitutional claim.

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The California Supreme Court
view on July 24, 1985. On
7, 1985, Dr. Hurvitz petitioned
t for a writ of certiorari,
g review of the final judgment of
of Appeal. Petitioner raises a
arguments and questions; however,
cognizable question is the
ionality of Business and
ns Code section 2361.

SUMMARY OF ARGUMENT

Bus. and Prof. Code section 2361
deny petitioner due process of
s section describes unprofessional
not criminal conduct. Neither
gligence" nor "incompetence" is so
indefinite as to deny due process.
w sources have defined gross
e to mean the want of even scant
n extreme departure from the
standard of conduct, and incompetence

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tutation, the California court
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ard when it relied on
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ply the legislature's
g unprofessional conduct.

ARGUMENT

I

SECTION 2361 DOES NOT DENY PETITIONER DUE PROCESS OF LAW

Petitioner contends that California Bus. and Prof. Code ("Code") section 2361 is unconstitutionally vague. This vagueness allegedly deprives him of due process of law. He argues that criminal due process standards of certainty apply to section 2361 because former Code section 2426 transformed all provisions of the California Medical Practice Act (Code §§ 2000 et seq.) into penal statutes. The state of the law is otherwise. The California Supreme Court has distinguished those statutes merely defining unprofessional conduct, on the one hand, from those making specific acts of unprofessional conduct actual crimes, in these words:

"It thus appears that where the Legislature intended to make criminal an act or omission specified as constituting unprofessional conduct it has expressly so stated without resort to section 2426." (People v. Superior Court (Douglass) 24 Cal.3d 428, 433.)

The Court concluded:

"[S]ection 2426 is reasonably susceptible of a construction that would exclude from its reach an act or omission which is declared only to be 'unprofessional conduct' and is not expressly described as a violation or crime." (Ibid., p. 434.)

Section 2361 does not define
ofessional conduct as a violation or
e. Petitioner's contention that due
ess criminal standards of certainty
rn this Court's examination of section
by reason of section 2426 is
rdingly without merit. (See, also,
art v. Bd. of Medical Quality Assurance
3) 80 Cal.App.3d 172, 183.)

Petitioner contends that section
must be held void for uncertainty
use it may not be made reasonably
ain by reference to other definable
ces. Without support he rejects the
nition of gross negligence judicially
rsed by the California courts.

It has been held that Code section
is not so vague and indefinite as to
ive a physician of due process of law

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75.) In like manner, a statute
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und for revocation of a certificate to
ice medicine, under circumstances
in a physician was given notice of the
es and a hearing thereon, did not
te constitutional principles.
kley v. Hassig (1936) 83 F.2d 351,
354. (10th Cir.)) The Court
peals wrote that "It was for the
cal] board to determine, within the
s of reason, what constitutes
ofessional conduct' . . . There is
antial evidence to support its
ng." (83 F.2d 354.)[5/]

. A prehearing appeal to the Supreme
of the United States was dismissed
se no substantial federal question was
nted. (Brinkley v. Hassig (1930) 282
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even scant care or an extreme
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(Gore v. Bd. of Medical Quality
e (1980) 110 Cal.App.3d 184, 196,
sician); Cooper v. Bd. of Medical
s (1975) 49 Cal.App.3d 931, 941
ogist); and Van Meter v. Bent
tion Co. (1956) 46 Cal.2d 588, 594
ractor).) Due process analysis has
on whether the term in question
ll-defined meaning in the law and
edical profession. Gross
ce has a well-understood meaning
in innumerable cases arising in
hes of the law, as well as in many
olving the relations of physicians
patients." (Yoshizawa v. Hewitt
F.2d 411, 413 (9th Cir.))
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[Citations.]

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(Ibid.)

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hizawa v. Hewitt, supra, 52

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l v. Bd. of Regents (1946)

65 N.E.2d 184, 187, mot. den.

66 N.E.2d 590-591.)

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e impossible to draft
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[citations], ... (People ex rel. Mosk v. National Research Co. of Cal., 201 Cal.App.2d at p. 772)." (32 Cal.3d at pp. 368-369.)

Gross negligence and incompetence are terms which must be translated into specific situations of fact.

Petitioner objects to any procedure whereby the testimony of medical experts may be sufficient to establish the community standard and its breach (Petn., p. 36) and whereby a "lay judge" may be a fact finder in a medical case. (Petn., p. 37.) However, qualified medical experts traditionally testify as to what type of diagnosis or treatment of an injury or illness is in accord with the prevailing standards of good medical practice in the locality. (Sinz v. Owens (1949) 33 Cal.2d 749, 753.) Proof of physician malpractice requires two evidentiary steps: (1)

evidence of the recognized standard of the medical community in the particular kind of case and (2) a showing that the accused physician negligently departed from this standard in his treatment of plaintiff. (Davis v. Virginian Railway Co. (1960) 361 U.S. 354, 357.)

It has been a long-standing rule that medical witnesses may testify concerning the standard of care and its breach, and it is competent for witnesses, who were experts, to characterize the manner of examination and treatment. This procedure is not objectionable on the ground that it supplants the judgment of the jury. (Northern Pacific R. Co. v. Urlin (1895) 158 U.S. 271, 273.)

A physician's culpability in matters of alleged gross negligence may require proof of technical matters, and the agency record "must include any technical

atter necessary to enable a lay judge to etermine whether the agency's decision has dequate support." (Franz v. Bd. of edical Quality Assurance (1982) 31 Cal.3d 24, 139.) A hearing officer (lay judge) as the power to preside alone at isciplinary hearings when such authority as been delegated by the agency. (Stewart . Bd. of Medical Quality Assurance, supra, 0 Cal.App.3d 182.)

In a separate due process issue, n which he seems to retreat from his osition that the term is vague, petitioner sks this Court to assume the California egislature intended "gross negligence" to e used in the usual civil tort context of edical negligence. If that be true, he rgues, and if none of the patients uffered bodily injury by reason of etitioner's surgeries, then a necessary lement of the tort has not been

ablished; ergo, the discipline has been
osed without due process of law.
tn., pp. 37-38.)

Petitioner's premises are flawed.
st, it has never been the law that
ient complaints against a physician are
sine qua non of agency action against
h a licensee. Furthermore, by accepting
findings as true for the purpose of
s argument, petitioner must acknowledge
t he performed unnecessary surgical
cedures upon 22 separate patients. If
s be true, how can he contend none of
se has suffered bodily injury at his
ds? Even hundreds of encomiums from
isfied patients are irrelevant to what
essentially a scientific inquiry into
itioner's behavior. (*Brinkley* v. *Hassig*,
ra, 83 F.2d 356.)

Petitioner furnishes no authority
t the elements of a disciplinary charge

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It is error to apply the standard
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disciplinary hearing. (Dailey v.
Carolina State Bd. of Dental Ex.
309 N.C. 710, 309 S.E.2d 219, 226.)
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er may be held civilly liable in
s serves a different purpose than
ute setting forth a violation for
such provider may be subject to
line, notwithstanding both actions
termed malpractice or negligence.
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Y. 101, 65 N.E.2d 184, 188,
g with approval Mandel v.
Regents (1928) 250 N.Y.
75, 164 N.E. 896.)
etitioner next contends that
cases do not sufficiently define
nce." Petitioner acknowledges that
ndicates an absence of qualification,
fitness to perform a prescribed
nction (Pollak v. Kinder (1978) 85
833, 837.) Petitioner argues that
s fatally uncertain because neither
nor a court is able to state what
and functions of a physician
tn., p. 40.) Again, the law is
A statute providing for

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supra, 52 F.
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(Yoshizawa v. Hewitt,
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clearly akin to a standard of
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ce. In that sense, the
ther case may be established
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II

l DOES NOT DENY PETITIONER
L PROTECTION OF THE LAW

ioner rides his due process
he arena of equal protection,
ntion that vague and

ambiguous statutory language prevents uniform operation of law. (Petn., pp. 32-33.) In In re Newbern (1960) 53 Cal.2d 786, cited by petitioner, the California Supreme Court would have upheld the involved Penal Code section if the Court were satisfied that the term "common drunk" had any established technical or common law meaning. (53 Cal.2d 795.) In like manner, in Barker Bros., Inc. v. Los Angeles (1938) 10 Cal.2d 603, 607, the Court wrote that a city ordinance taxing "department stores" contained no definition of the term by which one may know whether a particular business is included. Such cases are inapposite when, as here, the term "gross negligence" has a well-defined meaning both in the law and in the medical profession. (Yoshizawa v. Hewitt, supra, 52 F.2d 415.)

Acknowledging it is difficult to apply a traditional equal protection analysis to vague statutes, petitioner nevertheless urges application by this Court of the "strict scrutiny" standard. (Petn., p. 33.)

The California Supreme Court has rejected application of the strict scrutiny standard in a case which reviewed a statutory classification based upon the type of medical degree possessed by osteopathic and allopathic physicians. (D'Amico v. Board of Medical Examiners (1974) 11 Cal.3d 1.) The more stringent standard for equal protection analysis was not applied because (1) the classification involved was not one which was clearly suspect, (2) while there may be a cognizable fundamental interest in the right to pursue employment, it is limited to the common occupations of the community,

should not be applied to professions
e technical complexity and intimate
tionship to the public interest and
are counsel greater deference to the
slative judgment, and (3) "fundamental
rests" for the purpose of equal
ection review are limited to rights
h are explicitly guaranteed by the
titution. (Ibid., p. 18, citing San
nio School District v. Rodriquez (1973)
U.S. 1, 33-34.)

As in D'Amico, supra, petitioner has
demonstrated a suspect classification,
has he articulated any cognizable
lamental right or interest guaranteed by
Constitution. In short, he has not
eged that he has been treated any
ferently than any other physician who
have been accused, and found guilty, of
ss negligence or incompetence, by the
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The Fourteenth Amendment's equal
ion clause does not "assure
ity of judicial decisions . . ."
. Washington (1962) 369 U.S. 541,
; citing Milwaukee E.R. & L. Co. v.
sin ex rel. Milwaukee (1920) 252 U.S.
6.) One against whom a judicial
on has been rendered can base no
, under the equal protection clause,
later decision between strangers
is asserted to be irreconcilable on a
of law with the earlier decision.
ukee E. R. & L. Co., supra.)

As this Court pronounced in
z v. North (1926) 271 U.S. 40, 43:

"A statute which places all
ysicians in a single class, and
escribes a uniform standard of
ofessional attainment and

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mity to that standard, does
ny the equal protection of
ws within the meaning of the
eenth Amendment. (Dent v.
Virginia, 129 U.S. 114; Reetz
chigan, 188 U.S. 505; Watson
ryland, [218 U.S. 173]."

III

ON 2361 DOES NOT REPRESENT AN
STITUTIONAL DELEGATION OF POWER
O AN ADMINISTRATIVE AGENCY

Petitioner contends that section
nconstitutional because it has not
mpanied by safeguards adequate to
n abuse of the authority delegated
ard to determine and punish acts
essional conduct. (Petn., p. 41.)

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Co. v. Board of Supervisors
pp.3d 1,11.) The facts of
that the state Forest
ub. Res. Code, §§ 4521-4618)
situation under which rules
he environment were under
ontrol of persons
erested in the timber
, the Act unconstitutionally
cess of law to the interested
ublic. Petitioner has shown
ecuniary interest of the
ubject matter of his case.
atute empowering an
tive agency to exercise
of a high order in
ng legislative policy
onfer unrestricted powers.
.]" (CEED v. California
ne Conservation Com. (1974)
.3d 306, 327; distinguishing
mber Co., supra, at p. 328.)

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(Bigelow v. Vi
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McNaughton v.
348-349.) A
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vided within its borders.
inia (1975) 421 U.S. 809,
as broad power to establish
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n of all professions
ealth. A state's
rn for maintaining high
fessional conduct among its
ers it to exercise
vision which extends beyond
g. (Barsky v. Board of
47 U.S. 442, 449, 451; see
hnson (1917) 242 U.S. 344,
te is primarily the judge
equired in the interest of
d welfare, "and its police
y be declared

unconstitutional where they are arbitrary or unreasonable attempts to exercise the authority vested in it in the public interest. [Citations.]" (Graves v. Minnesota (1926) 272 U.S. 425, 428.)

There was no arbitrary or unreasonable action by the Board, which, "in this case relied on competent medical professionals to interpret and apply the Legislature's intent concerning 'unprofessional conduct.'" (Opinion of the Cal. Ct. of Appeal, Petn., p. A27.)

* * * * *

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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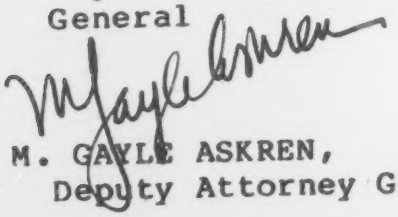
General



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SEYMOUR ALLAN HURVITZ, M.D.,

Petitioner,

v.

DIVISION OF MEDICAL QUALITY, BOARD OF MEDICAL QUALITY ASSURANCE, DEPARTMENT OF CONSUMER AFFAIRS, STATE OF CALIFORNIA,

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within Brief of Respondents In Opposition as follows: To Alexander L. Stevas, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and 39 copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing three copies in a separate envelope addressed for and to each addressee named as follows:

S. Allan Hurvitz, M.D.
2080 Century Park East
Suite 508
Los Angeles, California 90067

Each envelope was then sealed and with the postage prepaid deposited in the United States Mail by me at San Diego, California, on the 19th day of December, 1985.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, December 19, 1985.

Clifford E. Reed Jr.
CLIFFORD E. REED, JR.

Subscribed and sworn to before me this 19th day of December, 1985.

Vida M. Allen
Notary Public in and for said County and State

VIDA M. ALLEN
NOTARY PUBLIC—CALIFORNIA
COUNTY OF SAN DIEGO
My commission expires Aug. 20, 1986